Supreme Court, U.S.
FILED
DEC 18 1998
OFFICE OF THE CLERK

No. 98-469

In the Supreme Court of the United States

OCTOBER TERM, 1998

ALEKSANDR KASHUBA, PETITIONER

v.

LEGION INSURANCE COMPANY, C/O HAMILTON BALLARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

HENRY L. SOLANO
Solicitor
ALLEN H. FELDMAN
Associate Solicitor
NATHANIEL I. SPILLER
Deputy Associate Solicitor
GARY K. STEARMAN
Attorney
Department of Labor
Washington, D.C. 20210

14 pp

QUESTIONS PRESENTED

1. Whether evidence that an untimely notice of injury has impeded an employer's ability to investigate the nature and extent of an alleged work-related injury or to provide medical services for such injury is sufficient to establish prejudice under 33 U.S.C. 912(d).

2. Whether the court of appeals erred in failing to remand to the administrative law judge (ALJ) for further fact-finding after the court of appeals determined that the ALJ had applied an incorrect legal standard.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Bivens v. *Newport News Shipbuilding & Drydock Co.*, 23 Ben. Rev. Bd. Serv. (MB) 233 (1990)	2, 6, 7
Cox v. *Brady-Hamilton Stevedore Co.*, 25 Ben. Rev. Bd. Serv. (MB) 203 (1991)	7
ITO Corp. v. *Director, Office of Workers' Compensation Programs*, 883 F.2d 422 (1989)	5, 7, 8
Jones Stevedoring Co. v. *Director, Office of Workers' Compensation Programs*, 133 F.3d 683 (9th Cir. 1997)	6-7, 8, 9
Metropolitan Stevedore Co. v. *Rambo*, 521 U.S. 121 (1997)	9
Mobil Oil Corp. v. *FPC*, 417 U.S. 283 (1974)	9
O'Keefe v. *Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965)	9
Port of Portland v. *Director, Office of Worker's Compensation Programs*, 932 F.2d 836 (9th Cir. 1991)	8
Potomac Elec. Power Co. v. *Director, Office of Workers' Compensation Programs*, 449 U.S. 268 (1980)	7
Richardson v. *Perales*, 402 U.S. 389 (1971)	9
Strachan Shipping Co. v. *Davis*, 571 F.2d 968 (5th Cir. 1978)	4, 6

Statutes and regulations: Page

Department of Labor Appropriation Act, 1996, Pub. L. No. 104-134, 110 Stat. 1321-219 4
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*:
33 U.S.C. 903(a) 2
33 U.S.C. 908 2
33 U.S.C. 909 2
33 U.S.C. 912(a) 2, 6
33 U.S.C. 912(d) 2, 6, 8
33 U.S.C. 920(b) 2, 6
33 U.S.C. 921(b)(3) 8
20 C.F.R. 702.216 ..... 2, 6

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-469

ALEKSANDR KASHUBA, PETITIONER

v.

LEGION INSURANCE COMPANY, C/O HAMILTON BALLARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B9) is reported at 139 F.3d 1273. The court's order denying rehearing (Pet. App. A1), the notice of affirmance from the Benefits Review Board (Pet. App. C1), the decision and order of the administrative law judge (ALJ) awarding benefits (Pet. App. E1-E30), and the ALJ's order denying reconsideration (Pet. App. D1-D2) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1998. Pet. App. B1. A petition for rehearing was denied on June 16, 1998. Pet. App. A1. The peti-

tion for a writ of certiorari was filed on September 14, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA or Act) provides compensation for work-related injuries that result in the disability or death of covered employees. 33 U.S.C. 903(a), 908, 909. Absent circumstances not applicable here, an injured employee must give notice of a compensable injury "within thirty days after the date of such injury." 33 U.S.C. 912(a). The employee's failure to provide timely notice bars the claim if, *inter alia*, prejudice to the employer results. 33 U.S.C. 912(d); 20 C.F.R. 702.216. The absence of prejudice is presumed, and the employer bears the burden of rebutting that presumption. See 33 U.S.C. 920(b) (presumption of sufficient notice); 20 C.F.R. 702.216; Pet App. B6 (citing *Bivens* v. *Newport News Shipbuilding & Drydock Co.*, 23 Ben. Rev. Bd. Serv. (MB) 233, 240 (1990)).

2. Petitioner Aleksandr Kashuba fractured his back in an automobile accident in the Soviet Union in 1984. After immigrating to the United States in 1989, petitioner worked sporadically as a painter for respondent Northwest Marine (Northwest) during the nine months beginning in September, 1990. Pet. App. E10-E11. Lay-offs and periods of unemployment alternated with full-time employment. *Ibid.* On June 16, 1991, his last day of work before a lay-off, petitioner allegedly injured his back while lifting heavy barrels of paint. *Id.* at E15. More than four months later, petitioner, through his attorney, notified Northwest of the back injury, but only after he had already undergone back surgery. *Ibid.*

Petitioner had a history of back problems dating from his injury in 1984. Pet. App. B5 n.2, E11-E12. After that injury, petitioner was hospitalized for twenty days, bedridden for two to three months, and unable to work for three years. *Id.* at E11. In January 1990, soon after arriving in the United States, he complained of spinal pain and occasional left leg numbness. *Id.* at E11-E12. In April 1991, he reported worsening lower back pain, related to lifting thirty pounds three weeks earlier, and was diagnosed with "back strain with a questionable S1 herniated disc." *Id.* at E12. On June 21, 1991, five days after the alleged accident, petitioner reported decreased back and leg pain with numbness in the leg for the previous week and a half; petitioner told the examining physician that the back pain was chronic, but the numbness was recent. *Id.* at E16-E17. In July 1991, petitioner reported increased pain of three weeks duration, but failed to identify any lifting injury. A CT scan was performed; lumbosacral stenosis and nerve root damage were diagnosed. *Id.* at E17.

A neurosurgeon examined petitioner in August 1991 and confirmed that petitioner had significant lower back disc problems. Pet. App. E16, E18. One month later, the neurosurgeon performed back surgery. The hospital admission record indicates that petitioner had suffered an injury three months earlier while working as a painter for Northwest and had experienced back pain since then. *Id.* at E18. In a follow-up examination in October 1991, the neurosurgeon suggested 60 more days of "welfare" and then assignment to medium work with no heavy lifting and bending. *Id.* at E16. In December 1991, the physician who initially examined petitioner cleared him to return to work. *Ibid.*

3. An administrative law judge (ALJ) awarded petitioner temporary total disability compensation benefits

from the date of alleged injury to the date that petitioner received authorization to return to work. Pet. App. E29. Despite finding "significant credibility problems" with petitioner's testimony regarding "the circumstances and dates" of his work for Northwest in relation to his back injury, *id.* at E19, the ALJ rejected Northwest's claim of prejudice arising from petitioner's untimely notification of injury. Although finding that petitioner's explanation for providing the untimely notice was "not persuasive or believable," *id.* at E24, the ALJ ruled that Northwest had not established prejudice because it had not presented evidence of attempts to investigate the injury following its receipt of notice. *Id.* at E25-E26. Petitioner and Northwest appealed to the Benefits Review Board (Board).

4. In 1996, Congress directed that any appeal that had been pending before the Board for more than one year was to be considered affirmed if the Board did not act on the appeal by September 12, 1996. Department of Labor Appropriations Act, 1996, Pub. L. No. 104-134, 110 Stat. 1321-219. Petitioner's appeal and respondent Northwest's cross-appeal had been pending before the Board for more than a year on September 12, 1996, and the ALJ's decision therefore became final as of that date. Pet. App. C1. Both parties sought further review in the court of appeals.

5. The court of appeals reversed the award of benefits. Pet. App. B1-B9. Agreeing with *Strachan Shipping Co.* v. *Davis*, 571 F.2d 968, 972 (5th Cir. 1978), the court held that prejudice exists if an untimely notice of injury impedes "the employer's ability to determine the nature and extent of the injury or illness or to provide medical services." Pet. App. B7. It further held that "evidence of an employer's post-notice attempts to investigate" the claim is not required in order for the

employer to establish prejudice, and explained that its holding was consistent with the Fifth Circuit's decision in *ITO Corp.* v. *Director, Office of Workers' Compensation Programs*, 883 F.2d 422, 424 (1989). Pet. App. B6-B7. The court therefore found fault in the ALJ's determination that post-notice evidence of the employer's attempts to investigate the claim is necessary to establish prejudice. *Id.* at B7. The court of appeals specifically cautioned, however, as the Fifth Circuit had held in *ITO Corp.*, that a conclusory allegation of prejudice is insufficient. *Ibid.*

The court then held that the ALJ's finding that Northwest was not prejudiced by the lack of timely notice was not supported by substantial evidence. Pet. App. B8. Given the many credibility problems with petitioner's claim, including inconsistencies in his reports of back pain, the court determined the late notice precluded Northwest from developing the "specific and comprehensive" evidence it needed to disprove the presumed connection between the injury and petitioner's employment. *Id.* at B8. The court further agreed with Northwest that the late notice prevented it from participating in petitioner's medical care and obtaining a second opinion before petitioner underwent major surgery. *Ibid.* Accordingly, it found that Northwest "was prejudiced by its inability to disprove that it had any liability for the claim." *Ibid.* The court noted that its conclusion furthered the purposes of the timely notice requirement of promoting effective investigations and medical services and preventing fraudulent claims. *Ibid.*

The panel denied rehearing, and no judge of the full court requested a vote on the suggestion to rehear the case en banc. Pet. App. A1.

ARGUMENT

The court of appeals identified the correct legal standard for establishing prejudice under Section 12(d) of the LHWCA, 33 U.S.C. 912(d). Other courts of appeals have uniformly applied that standard, which does not conflict with any decision of this Court. The decision of the court of appeals here, applying that standard to the particular facts of this case, that Northwest established prejudice does not warrant this Court's review.

1. A claimant who is aware of a work-related injury must provide the employer with notice of the injury within 30 days. 33 U.S.C. 912(a). The failure to notify the employer within that time limit does not bar the claim, however, if no prejudice to the employer results. 33 U.S.C. 912(d). Sufficient notice is presumed, 33 U.S.C. 920(b); therefore, the employer must establish prejudice by substantial evidence. See 33 U.S.C. 920(b); 20 C.F.R. 702.216; Pet. App. B6 (citing *Bivens* v. *Newport News Shipbuilding & Drydock Co.*, 23 Ben. Rev. Bd. Serv. (MB) 233, 240 (1990)).

The court of appeals articulated the correct legal standard for establishing prejudice: it is sufficient that the employer provides "evidence that lack of timely notice did impede [its] ability to determine the nature and extent of the injury or illness or to provide medical services." Pet. App. B7. The Fifth Circuit has articulated the applicable standard in nearly identical terms. See, *e.g.*, *Strachan Shipping Co.* v. *Davis*, 571 F.2d 968, 972 (1978) (inability "to effectively investigate to determine the nature and extent of the alleged illness or to provide medical services" establishes prejudice); see also *Jones Stevedoring Co.* v. *Director, Office of Workers' Compensation Programs*, 133 F.3d 683, 690 (9th Cir. 1997) ("'[p]rejudice' means merely that the em-

ployer's ability to investigate the case has been impaired due to the delay in giving notice"). The Board has also described the standard similarly. *Bivens*, 23 Ben. Rev. Bd. Serv. (MB) at 240 ("employer bears the burden of proving by substantial evidence that it has been unable to effectively investigate some aspect of the claim"); *Cox* v. *Brady-Hamilton Stevedore Co.*, 25 Ben. Rev. Bd. Serv. (MB) 203, 207 (1991) (same).

Contrary to petitioner's contention (Pet. 10), the decision in this case does not conflict with the ruling of the Fifth Circuit in *ITO Corp.* v. *Director, Office of Workers' Compensation Programs*, 883 F.2d 422 (1989). As the court of appeals here explained, the court in *ITO Corp.* "merely found that a general claim that the employer had 'no opportunity to investigate the claim when it was fresh' was not persuasive." Pet. App. B7 (quoting *ITO Corp.*, 883 F.2d at 424). Consistent with the Fifth Circuit's holding in *ITO Corp.*, the court of appeals in this case cautioned that "a conclusory allegation of prejudice is not" sufficient. Pet. App. B7. Petitioner and the ALJ are mistaken in interpreting *ITO Corp.* as mandating evidence of the employer's actual post-notice investigation. See Pet. 9; Pet. App. E25-E26. In addition, none of the Benefits Review Board cases cited by petitioner adopts that proposition.[1] Rather, the proper inquiry is whether the evidence demonstrates that the delayed notice impaired the employer's "'opportunity to investigate the claim

---

[1] The Board cases cited by petitioner endorse rather than depart from the rule that the court of appeals adopted here. Even if the Board had articulated a more stringent test, its interpretation would not be entitled to deference. *Potomac Elec. Power Co.* v. *Director, Office of Workers' Compensation Programs*, 449 U.S. 268, 278 n.18 (1980).

when it was fresh.'" *ITO Corp.*, 883 F.2d at 424 (citation omitted).

Certainly evidence that the employer attempted to investigate the injury but the investigation was frustrated by the lateness of the notice makes an employer's claim of prejudice very compelling. Nonetheless, a reasonable inference of prejudice may arise from other relevant evidence as well.[2] It is unnecessary to require the employer to introduce evidence that it attempted to investigate but was stymied in its ability to determine the validity of the claim, when the known facts permit an inference that the late notice of injury rendered an investigation futile. The timely notice requirement of Section 12(d) of the LHWCA, 33 U.S.C. 912(d), although not jurisdictional, is intended to protect employers from fraudulent claims. *Port of Portland* v. *Director, Office of Workers' Compensation Programs*, 932 F.2d 836, 841 (9th Cir. 1991). Unduly restricting their ability to prove prejudice undermines that purpose. Thus, substantial evidence of various sorts that permits a reasonable fact-finder to determine the prejudice issue should be sufficient.

2. Petitioner further argues (Pet. 18-19) that the court of appeals substituted its view of the facts for the ALJ's and thereby exceeded the proper scope of its review under 33 U.S.C. 921(b)(3). As discussed above, the court of appeals correctly held that the ALJ erred by requiring evidence of an actual post-notice investiga-

---

[2] In that regard, it is useful to compare the facts of this case, in which petitioner's medical condition changed materially between the date of injury and the notice, see pp. 2-3, *supra*, with those of *Jones Stevedoring Co.*, *supra*, in which the employer had "ample time to obtain discovery" and the claimant's medical condition had not changed between injury and notice. See 133 F.3d at 690.

tion in order to establish prejudice. The court then went on to conclude that the evidence established that Northwest suffered prejudice, and the court did not remand to the ALJ. Cf. *Metropolitan Stevedore Co.* v. *Rambo*, 521 U.S. 121, 140 (1997) (holding that court of appeals erred in failing to remand for further fact-finding by ALJ after clarifying the proper legal standard, because there were not sufficient facts in the record to apply that standard).

Any error that the court might have committed in failing to remand would not warrant this Court's review. The "substantial evidence" standard of review, applicable here, is well-established, see, *e.g.*, *O'Keeffe* v. *Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 361-363 (1965); *Richardson* v. *Perales*, 402 U.S. 389, 401 (1971), and requires no further clarification for either the courts of appeals generally, *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 310 (1974) (explaining that this Court rarely intervenes in substantial evidence cases), or the panel that decided this case. See Pet. App. B5 (correctly describing substantial evidence standard); *Jones Stevedoring Co.*, 133 F.3d at 685-686 (panel composed of the same judges correctly applying substantial evidence standard in another LHWCA case). Unlike *Metropolitan Stevedore Co.* v. *Rambo*, *supra*, this case presents no difficult question of statutory interpretation that warrants resolution by this Court. The question whether the court of appeals correctly applied the substantial evidence standard to the unique facts of this case does not independently warrant the Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

HENRY L. SOLANO
Solicitor

ALLEN H. FELDMAN
Associate Solicitor

NATHANIEL I. SPILLER
Deputy Associate Solicitor

GARY K. STEARMAN
Attorney
Department of Labor

DECEMBER 1998